No. 16-1454

IN THE

Supreme Court of the United States

STATE OF OHIO, ET AL.,
Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE AUSTRALIAN TAXPAYERS' ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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January 23, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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INTEREST OF AMICUS CURIAE

The Australian Taxpayers' Alliance ("ATA") is a non-profit, grassroots advocacy and activist organization composed of over 25,000 members committed to limited government and a market-based approach to economics in Australia.[1] Since its founding in 2012, the ATA has opposed the increasing interference of the Reserve Bank of Australia ("RBA") in the credit card industry, believing that such activity undermines efficiency and competition in the market and has adverse effects on consumer welfare. In light of the submission of the Australian Retailers Association ("ARA"), which misleadingly describes the RBA's credit card regulations and their effects on the Australian economy, the ATA is interested not only in correcting the record, but also in ensuring that the sorts of practices endorsed by the ARA are not enacted in other jurisdictions, including the United States. Further, given the ATA's clear and longstanding commitment to limiting governmental regulation, the ATA is interested in the United States continuing to serve as a model for the use of market-driven solutions in industry and commerce.

SUMMARY OF ARGUMENT

In this case, the ARA has taken a simple but misleading position: elimination of anti-steering rules formerly imposed by companies like American Express ("Amex") has immensely benefited merchants and

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the Australian Taxpayers' Alliance or its members made any monetary contribution to the preparation or submission of the brief. The parties have consented to this filing.

consumers in Australia, and it will do the same in the United States. This position is fundamentally flawed.

First, the effects of the RBA's regulations, including the elimination of anti-steering rules, have been devastating for Australian consumers. While merchants have benefited significantly from these regulations—as the RBA intended—there is no evidence that merchants have passed any savings on to consumers, even while cardholders experience increased costs and reduced benefits. Moreover, this sort of regulation—designed to drive consumers toward certain payment options—stifles, rather than enhances, competition.

Second, the credit card industry is highly regulated in Australia, and elimination of anti-steering rules was only a part of the broad system of regulations imposed by the RBA. Even assuming some positive impact, the effects of the elimination of anti-steering provisions cannot be separated from the other measures imposed by the RBA, particularly the hard cap on interchange fees that was the centerpiece of the RBA's regulations.

Third, the credit card industries in Australia and the United States are so fundamentally different that the reaction of one jurisdiction to a reform measure—such as the elimination of anti-steering rules—is not an accurate predictor of the reaction in the other. The stark differences between these two jurisdictions has been acknowledged throughout this litigation and by independent observers, and the ARA's attempt to obscure this fact should not be condoned.

ARGUMENT

I. AUSTRALIA'S REGULATION OF THE CREDIT CARD INDUSTRY HAS HARMED CONSUMERS AND COMPETITION

The ARA paints an unnaturally sanguine picture of the impact the RBA's regulations, including the elimination of anti-steering rules, have had on consumers. In fact, consumers have experienced a variety of costs since the enactment of the regulations. Such costs are an unfortunate but inevitable consequence of imposing a system that is, at its core, contrary to Western free-market ideals.

A. Australian Consumers Have Experienced Significant Costs That Are Likely to Continue

The ARA insists that the decline of merchant fees resulting from the RBA's regulations has benefited consumers. For example, it claims that "[l]ower merchant fees have led to hundreds of billions of dollars of savings to merchants (and consumers)"[2] and "the reforms have led to lower merchant fees, which have in turn led to lower prices for consumers."[3] These assertions, however, are wholly conclusory, and they ignore the evidence that merchants' savings in Australia are not being passed along to consumers.[4]

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[2] Brief for the Australian Retailers Association as *Amicus Curiae* in Support of Petitioners, *Ohio v. American Express Co.*, No. 16-1454, 2017 WL 6398767 at *14 (U.S. Dec. 14, 2017) (hereinafter, "ARA Brief").

[3] *Id.* at *18.

[4] The ATA agrees with the conclusion of the U.S. Court of Appeals for the Second Circuit that the credit card market is "two-sided" and that it would be erroneous to "focus[] entirely on

To be clear, merchants have experienced a significant windfall because of the RBA's regulations. According to one analysis of the effect of the regulations in Australia, "merchants were saving approximately $676 million annually as a result of reduced fees," meaning that they have saved approximately $10 billion since 2003.[5] The major beneficiaries appear to be "very large merchants," among which surcharging is "more common" than their smaller counterparts.[6] Such a redistribution was intended: as one scholar explained, "The RBA's program is explicitly designed to improve the position of merchants."[7]

Multiple reports, however, express skepticism that the merchants' windfall was passed along to consumers. In its "Preliminary Conclusions" regarding the effects of its sweeping regulations, published in 2008, the RBA explained that "no concrete evidence has been presented to the [RBA] regarding the pass-through of

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the interests of merchants while discounting the interests of cardholders." App. 54a. In our view, "[a] correct analysis of competitive effects would [be] two-sided, considering *both* the effects on network services to merchants *and* the effects on credit card services to cardholders." Brief for J. Gregory Sidak et al. as *Amici Curiae* in Support of Defendants-Appellants, *United States v. American Express Co.*, No. 15-1672, 2015 WL 4873717, at *13 (2d Cir. Aug. 10, 2015) (emphasis in original).

[5] Tim Andrews & Aaron Lane, *Submission to the Reserve Bank of Australia's Consultation on Draft Standards for Credit Card Payments*, at 7 (Feb. 2016), *available at* https://goo.gl/wuSdf7 (hereinafter, "Andrews & Lane Submission").

[6] Reserve Bank of Australia, *Review of Surcharging: A Consultation Document*, at 2 (June 2011), *available at* https://goo.gl/cpyKyM.

[7] Richard A. Epstein, *The Regulation of Interchange Fees: Australian Fine-Tuning Gone Awry*, 2005 Colum. Bus. L. Rev. 551, 554 (2005), *available at* https://goo.gl/Pn8Kk4.

these savings."[8] That same year, the United States Government Accountability Office ("GAO") issued a report following a study of the Australian reforms and concluded that there was "no conclusive evidence" that merchants reduced prices for goods.[9] And as late as 2015, the RBA admitted that it was "impossible . . . to measure exactly how these reductions in merchant service fees have flowed through into prices for consumers."[10] Rather, the RBA—and the ARA in its brief—declare that it just "seems reasonable to assume that they have mostly flowed through to lower retail prices for customers."[11] The lack of analysis to substantiate this supposedly "reasonable assumption" is striking. As scholars have noted, "the RBA provides no reason why it would not be equally reasonable to assume that the [merchant fee reduction] flows mostly to the merchants' profit margins. Indeed, profit is something that is curiously missing from the entire RBA analysis."[12]

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[8] Reserve Bank of Australia, *Reform of Australia's Payments System: Preliminary Conclusions of the 2007/08 Review*, at 13 (Apr. 2008), *available at* https://goo.gl/hPXsdx (hereinafter, "RBA Preliminary Conclusions").

[9] U.S. Government Accountability Office, *Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist* (May 2008), *available at* https://www.gao.gov/assets/280/275422.pdf (hereinafter, "GAO Report").

[10] Reserve Bank of Australia, *Review of Card Payments Regulation: Issues Paper*, at 23 (Mar. 2015), *available at* https://goo.gl/D7iadh (hereinafter, "RBA Issues Paper").

[11] *Id.*

[12] Sinclair Davidson & Jason Potts, *Australian Interchange Fee Regulation: A Regulation in Search of a Market Failure*, at 11 (Sept. 2015), *available at* https://goo.gl/r2F2DD. *See also* American Express Australia Limited, *Review of Payments System*

In contrast to the vagueness regarding consumer benefits derived from the RBA's reforms, the costs that cardholders have experienced are clear. Evaluating the impacts of the RBA's reforms in 2008, one analysis found:

> Cardholders are paying more for their cards. Between 2002 and 2008, the RBA estimates that the average payment card fee rose by $40 per account, indicating that (with 12 million accounts held in 2008) cardholders are paying $480 million more to hold their cards than they did before the regulations took effect in 2003.[13]

The analysis further concluded that "no evidence has been presented that would allow one to conclude that the undeniable losses to cardholders have been offset by reductions in retail prices or improvements in the quality of retail service."[14] The GAO reached a similar conclusion, finding that "some costs for card users, such as annual and other fees, have increased" in the wake of the implementation of regulations like the removal of anti-steering rules.[15] Thus, independent analyses recognize that the gains merchants have

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Reforms – A Submission to the Reserve Bank of Australia, at 9 (Aug. 2007), *available at* https://goo.gl/P4N5RG (hereinafter "Amex RBA Submission") (cited in ARA Brief, at *10 nn.28 & 29) (noting that the "new independent line of revenue from surcharging profits [did not] appear[] to be passed on to consumers").

[13] Andrews & Lane Submission, at 6 (citing Robert Stillman, William Bishop, Kyla Malcolm & Nicole Hildebrandt, *Regulatory Intervention in the Payment Card Industry by the Reserve Bank of Australia*, CRA International, at 13 (Apr. 28, 2008), *available at* https://goo.gl/aBcPmz).

[14] Stillman, et al., *Regulatory Intervention*, at 33.

[15] *See* GAO Report.

experienced as a result of credit card regulation have not made their way to cardholders.

This is consistent with what occurred in the United States following the imposition of debit card interchange fee caps.[16] Passed to "address the rise of debit card fees,"[17] this legislation limited debit cards fees to "the sum of (1) 21 cents and; (2) 5 basis points multiplied by the value of the transaction."[18] Analyzing the effect of these regulations and the resulting gains to merchants, one set of scholars concluded:

> There is no reason to believe that merchants would give this windfall back to consumers . . . . A wealth of economic studies shows that does not happen in the real world. Consumers got the short end of the stick though. Merchant[s] are not giving enough of their gains back to consumers to compensate for the higher fees and reduced services that consumers are getting from banks as a result of the interchange price caps, nor, as we have shown, are merchants expected to do so.[19]

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[16] *See* 12 C.F.R. § 235. "An interchange fee is, to put it at its simplest, a fee paid by a merchant when the customer uses a credit or debit card to purchase goods or services." Andrews & Lane Submission, at 3.

[17] *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 958 F. Supp. 2d 85, 90 (D.D.C. 2013), *rev'd on other grounds*, 746 F.3d 474 (D.C. Cir. 2014).

[18] 12 C.F.R. § 235.3(b)(1)-(2).

[19] David S. Evans, Howard H. Chang & Steven Joyce, *The Impact of the U.S. Debit Card Interchange Fee Caps on Consumer Welfare: An Event Study Analysis*, Coase-Sandor Institute for Law & Economics, at 49 (2013), *available at* https://goo.gl/QkDvzz.

Indeed, while the "goal" of this legislation "was to lower merchants' costs of accepting debit cards and to pass along the cost savings to consumers in terms of reduced prices," a survey of 420 merchants found that "[t]he majority of respondents (75 percent) reported no price change," and "[f]or those who had a price change, 11 times more (23 percent over 2 percent) reported price hikes [rather] than cuts."[20] Ultimately, United States consumers "lost, on net, about $22 billion to $25 billion" from the enactment of debit card fee caps.[21] There were other collateral consequences for consumers as well, such as a sharp decrease in the availability of free checking accounts.[22] Given this experience with card regulation in the United States, as well as the rise of consumer costs in Australia, it stands to reason that elimination of anti-steering rules would harm American cardholders.

In addition to these costs, when merchants have been granted the ability to steer consumers, they have done so through exorbitant surcharges, making an additional profit at consumers' expense.[23] The RBA

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[20] Zhu Wang, Scarlett Schwartz & Neil Mitchell, *The Impact of the Durbin Amendment on Merchants: A Survey Study*, 100 Economic Quarterly 183, 185-89 (2014), *available at* https://goo.gl/C1AQkf.

[21] Evans, et al., *The Impact of the U.S. Debit Card Interchange Fee Caps*, at 49.

[22] *See* Mark D. Manuszak & Krzysztof Wozniak, *The Impact of Price Controls in Two-sided Markets: Evidence from US Debit Card Interchange Fee Regulation*, Federal Reserve, at 5-6 (2017), *available at* https://goo.gl/Vp4MCK.

[23] While the ATA recognizes that Petitioners are not challenging the prohibition on merchants imposing fees when accepting Amex cards, *see* App. 96a, given the private challenges to no-surcharge provisions, *see id.*, and the close relationship those rules have with anti-steering provisions, the ATA wanted

reported that "some merchants may be using surcharging as an additional means of generating revenue, rather than simply covering the costs of card acceptance," and "there are certain industries or payment channels where surcharging well in excess of merchant service fees is quite common."[24] The RBA found that the "increasingly widespread nature" of surcharge abuse had "the potential to distort price signals to cardholders."[25] As one Australian government official put it, "Consumers are outraged at the exorbitant fees and charges some companies make them pay when buying goods and services with their credit cards."[26] Furthermore, the regulations "promoted an environment where consumers have no protection against profiteering except to decline to proceed with a purchase, which may often be impracticable where time is pressing or an alternative merchant is not readily available."[27]

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to highlight the significant problems differential surcharging has presented in Australia.

[24] Reserve Bank of Australia, *A Variation to the Surcharging Standards: Final Reforms and Regulation Impact Statement*, at 4-5 (June 2012), *available at* https://goo.gl/LsWwE7.

[25] Reserve Bank of Australia, *Review of Card Surcharging: A Consultation Document*, at 1 (2011) *available at* https://goo.gl/fxf7bP. *See also* Marc Rysman & Julian Wright, *The Economics of Payment Cards*, at 14 (Nov. 2012), *available at* https://goo.gl/DAECC5 (noting that in Australia, "of the merchants that do surcharge, the *average* surcharge is around twice that of the merchant fee they face, and this average surcharge has increased even while merchant fees have decreased" (emphasis in original)).

[26] Press Release, David Bradbury, *Outing Credit Card Fee Gougers*, Australian Treasury (May 29, 2013), *available at* https://goo.gl/XU2yYj.

[27] Amex RBA Submission, at 10.

Faced with this pervasive problem of its own making, the RBA imposed additional regulations designed to protect the very consumers that the first round of credit card regulations purportedly helped.[28] Not only did the elimination of anti-steering rules create a surcharge regime prone to abuse, but it also required the Australian government to re-legislate an issue it had already attempted to solve. This sequence illustrates the perils of meddling in an already-functional free market: unintended consequences may harm certain parties and require continued governmental interference and expenditure of resources.

Finally, in addition to merchants withholding cost savings from customers and passing on only high surcharges instead, the RBA's regulations have also significantly diminished cardholder rewards. The RBA itself admitted in 2012 that customers were paying more and receiving less, noting that "benefits earned from spending on credit cards have become less generous while annual fees to cardholders have increased."[29] The RBA reiterated this conclusion as recently as 2016, when it conceded that "the cap on the highest credit card rates, is likely to result in some reduction in the generosity of rewards programs on

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[28] Reserve Bank of Australia, *Reforms to Payment Card Surcharging* (Mar. 2013), *available at* https://goo.gl/FjHDvK; *see also* CHOICE, *Credit Card Surcharges Need Government Action* (May 29, 2013), *available at* https://goo.gl/mpL79y (stating that "it's obvious the new surcharging rules are not working as intended" and "welcom[ing] the Federal Government's intervention").

[29] Iris Chan, Sophie Chong & Stephen Mitchell, *The Personal Credit Card Market in Australia: Pricing Over the Past Decade*, Reserve Bank of Australia, at 55 (Mar. 2012), *available at* https://goo.gl/zocAQ1.

some premium cards."[30] The RBA's interference in the credit card industry continues to cause the reduction of rewards opportunities for customers, eliminating both choices and benefits for cardholders.[31] In fact, one of the articles cited in the ARA's brief to support its assertion that Amex continues to offer "lucrative rewards credit cards"[32] actually begins with the clause, "While a number of *popular rewards cards have had their value slashed in recent months* . . . ."[33]

These credit cards rewards are unquestionably valuable to consumers.[34] Beyond that, reward programs also spur competition in the credit card industry as card providers compete to provide the best reward

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[30] Reserve Bank of Australia, *Review of Card Payments Regulation: Conclusions Paper*, at 47 (May 2016), *available at* https://goo.gl/FvDGtE.

[31] *See, e.g.*, Emily Cadman & Matthew Burgess, *Australians Wave Goodbye to Lavish Credit Card Perks*, Bloomberg (Mar. 13, 2017), *available at* https://goo.gl/vxHKU3; Jan McCallum, *Change Is Coming to Credit Card Rewards Programs*, INTHEBLACK (May 15, 2017), *available at* https://goo.gl/taAXX8; Chris Chamberlin, *Aussie Banks Rethink Credit Card Points, Fees Ahead of RBA Reform*, Australian Business Traveler (Jan. 12, 2017), *available at* https://goo.gl/9cdMsT.

[32] ARA Brief, at *22.

[33] Rebeccah Elley, *The 7 Best Rewards Credit Cards of 2016 in Australia*, Mozo (Jan. 2017) (emphasis added), *available at* https://goo.gl/yu6Fe6 (cited in ARA Brief, at *22 n.59).

[34] *See* Transcript, *United States v. American Express Co.*, No. 10-CV-4496 ("Amex Tr."), at 3962:14-16 (July 29, 2014) ("People want to use their American Express cards because they get rewards and American Express operates a very attractive rewards program."); *id.* at 4296:25-4297:1 (July 30, 2014) ("Rewards also create demand, not just at a particular merchant but for all merchants it creates that demand.").

packages to attract more consumers.[35] The reduction of rewards resulting from the elimination of anti-steering rules therefore not only harms consumers, but also creates an anticompetitive spiral that makes rectifying that harm nearly impossible.

B. The RBA's Regulations Are Harmful to Competition and Incompatible with Free-Market Principles

Beyond the questionable benefits conferred by the elimination of anti-steering rules and the clear harm it has inflicted on Australian consumers, this regulation was, at its core, an effort by the RBA to encourage the use of certain payment methods and favor merchants over other constituents in the market. Such a heavy-handed approach from the government runs counter to the United States' historic adherence to free-market principles.

Essentially, the RBA regulations aimed to remove rewards from the credit card system (a successful effort, as per the above), turn credit cards into a commodity, and drive consumers toward other forms of payment. As the ARA noted, the RBA's "intended result" was to "mov[e] consumers to lower-cost payment methods."[36] Statements by the RBA confirm that

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[35] *See* App. 179a ("Visa and MasterCard introduced new premium card categories intended to enable issuers to more effectively compete with Amex's high reward products."); Amex Tr. at 4260:7-12 (July 30, 2014) (noting that "different issuers of cards" are "certainly competing by offering what they hope cardholders will consider to be attractive rewards").

[36] ARA Brief, at *7.

it "introduced reforms" in an effort to "encourag[e]" the use of payment methods other than credit cards.[37]

Enacting reforms with such a targeted result in mind is harmful to competition on its face. A market-driven approach would allow credit card companies to offer terms—including anti-steering provisions—to merchants, who can then accept them, reject them, or negotiate based on business considerations. As Australian economists have maintained, "[t]he decision to accept credit card payments is a commercial decision that merchants make – there is no justification for the RBA to second-guess those commercial decisions."[38] Clearly, in the United States, merchants are exercising their right to make this commercial decision, as "roughly one-third of credit card-accepting merchants in the United States currently do not accept Amex," reflecting that merchants "reach different conclusions about whether or not to accept [Amex]" based on their "different costs and benefits."[39]

Protecting merchants' freedom to make this choice is far more compatible with the historic economic philosophy of the United States than is imposing regulations that bar anti-steering rules in commercial contracts. "The antitrust laws reflect a basic national

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[37] Michele Bullock, *A Guide to the Card Payments System Reforms*, Reserve Bank of Australia Bulletin, at 51 (Sept. 2010), *available at* https://goo.gl/qHfG5R.

[38] Sinclair Davidson & Jason Potts, *A Submission to the Reserve Bank of Australia's Consultation to the Bank's Standards for Credit Card Payments*, at 5 (Feb. 2016), *available at* https://goo.gl/XTZVL3.

[39] App. 47a.

policy favoring free markets over regulated markets."[40] Consistent with this national policy, this Court should not endorse an attempt to transform the antitrust laws into a mechanism to frustrate the free market rather than support it. This is especially true in this context, where regulations would "create as many distortions as they remove," making it difficult for "antitrust or competition policy [to] fashion a useful remedy."[41] Accordingly, Amex's right to include anti-steering provisions in its merchant contracts should be preserved.

II. THE ARA ERRONEOUSLY CLAIMS THAT THE ELIMINATION OF ANTI-STEERING RULES ALONE DIRECTLY CAUSED CERTAIN ECONOMIC EFFECTS AND TECHNOLOGICAL ADVANCEMENTS

The ARA begins its argument with the blithe assertion that the elimination of anti-steering rules in Australia has fostered price competition and created a dramatic drop in the merchant fees charged by Amex. This explanation elides the fact that the RBA's credit card regulation was a comprehensive effort focused not only on anti-steering provisions, but also on capping interchange fees and liberalizing access to Australia's credit card schemes. Ascribing the purported benefits of these reforms to the elimination of anti-steering provisions alone—as the ARA has done—is incorrect and misleading. Further, many of the innovations in the Australian credit card space identified by the ARA are more properly attributed to broader technological

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[40] *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991).

[41] Epstein, *The Regulation of Interchange Fees*, at 556.

progress, rather than the narrow cause of the removal of anti-steering rules.

A. Eliminating Anti-Steering Rules Was Only One Part of Australia's Comprehensive Regulation of the Credit Card Industry

As noted by the ARA, in October 2000, the RBA and the Australian Competition and Consumer Commission ("ACCC") published a report entitled "Debit and Credit Card Schemes in Australia: A Study of Interchange Fees and Access."[42] This study was "a comprehensive one"[43] that focused on "a number of public interest issues relating to competition and efficiency in credit card schemes."[44] Indeed, the RBA and ACCC acknowledged that "debit and credit card schemes have been the subject of a number of official and other studies in Australia," but differentiated their study based on the fact that "[i]nterchange fee arrangements"—not steering rules—would be "the main focus" of their enterprise.[45]

Following this study, in 2002, the RBA enacted what the ARA described as "a set of comprehensive reforms" to the credit card regulatory framework.[46] The RBA

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[42] Reserve Bank of Australia & Australian Competition and Consumer Commission, *Debit and Credit Card Schemes in Australia: A Study of Interchange Fees and Access* (Oct. 2000), *available at* https://goo.gl/tmrmE5 (hereinafter, "2000 RBA Study").

[43] Reserve Bank of Australia, *Payments System Board Annual Report 2000*, at 11, *available at* https://goo.gl/GDSoiR (hereinafter, "2000 RBA Report").

[44] Reserve Bank of Australia, *Payments System Board Annual Report 2001*, at 14, *available at* https://goo.gl/JS4sRg.

[45] 2000 RBA Study, at 2.

[46] ARA Brief, at *4.

explained its sweeping changes as "a package of reforms . . . [to] the Australian payments system,"[47] and the RBA has used the phrase "package of reforms" to describe the 2002 changes in the years that followed.[48] The RBA listed three main sets of regulatory measures: (1) "a standard on interchange fees" that included a "benchmark" rate; (2) "a standard on merchant pricing" that removed no-surcharge rules; and (3) "an access regime that removes restrictions on the eligibility of non-financial institutions to apply to participate in the designated credit card schemes."[49] Only one of these regulatory actions—the removal of no-surcharge rules—relates to the anti-steering provisions at issue here.

In fact, evidence suggests that the regulation of interchange fees,[50] rather than the elimination of anti-steering rules, was the most significant among the suite of reform measures.[51] Given the RBA's focus on

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[47] Reserve Bank of Australia, *Reform of Credit Card Schemes in Australia IV: Final Reforms and Regulation Impact Statement*, at 33 (Aug. 2002), *available at* https://goo.gl/dKkNYC (hereinafter, "RBA Final Reforms").

[48] *See, e.g.*, Malcolm Edley, *Speech to the Cards & Payments Australia Conference* (May 12, 2016), *available at* https://goo.gl/RkQGJm ("[A]fter a period of consultation, a package of reforms was implemented from 2003 onwards."); RBA Issues Paper, at 4, 5.

[49] RBA Final Reforms, at 33.

[50] The interchange fee reforms set a hard cap, requiring that the weighted average interchange fees in the MasterCard and Visa credit card schemes not exceed 0.50% of value of the transactions. *See* Reserve Bank of Australia, *Reform of Australia's Payments System: Conclusions of the 2007/08 Review*, at 3 (Sept. 2008), *available at* https://goo.gl/CiS9BD.

[51] *See* Epstein, *The Regulation of Interchange Fees*, at 582 (recognizing that capping interchange fees was the most important of the RBA's credit card industry reforms).

interchange fees in enacting its regulations,[52] it is no surprise that anti-steering rules were a secondary concern. Thus, anti-steering regulations were only one element—and likely a small element—of the RBA's comprehensive regulation of the credit card industry.

B. Ascribing Positive Economic Effects and Technological Innovation to the Elimination of Anti-Steering Rules is Facile and Misleading

Because elimination of anti-steering rules was only one part of the larger set of credit card regulations imposed by the RBA, it is misleading for the ARA to attribute all the purportedly positive effects of the regulations to the removal of anti-steering rules alone. The ARA claims that the reductions in merchant fees "are a direct result of merchants' ability to differentially price credit card services so as to foster price competition."[53] In fact, it was the RBA's direct regulation of Visa's and MasterCard's interchange rates—coupled with the threat of direct regulation of Amex's rates—that led Amex to reduce its rates as well. The data makes clear that the reduction in merchant fees from Visa and MasterCard is directly attributable to the interchange rate regulation.[54] The RBA has

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[52] *See, e.g.*, 2000 RBA Report, at 2 (describing the 2000 RBA Study as "a major study of interchange fees"). In addition, the 2000 RBA Report mentions "no surcharge" rules only twice in the 51-page report, whereas interchange fees are discussed in detail throughout.

[53] ARA Brief, at *6.

[54] Reserve Bank of Australia, *Payments Data C3: Average Merchant Fees for Debit, Credit and Charge Cards, available at* https://goo.gl/VzNZKD.

acknowledged that Amex rates declined in response as well, stating, "Merchant service fees charged by both American Express and Diners Club have been under downward pressure as merchants have reviewed their acceptance of these cards given the increase in their relative costs compared to MasterCard and Visa cards."[55] As explained at trial, the RBA's interchange fee regulation "put pressure" on Amex, leading the company to conclude that its "rate did have to come down" in response.[56] Therefore, ARA's insistence that elimination of anti-steering fees alone resulted in the widespread reduction of merchant fees is belied by the data, the statements of the RBA, and testimony at trial.

Similarly, the ARA's use of Woolworths as a "case study" to suggest that lower merchant fees resulted from the elimination of anti-steering provisions is misleading.[57] First, as described above, the downward pressure on merchant discount fees came primarily from the RBA's cap on interchange fees, rather than its removal of anti-steering rules. Direct rate regulation was far more responsible for the drop in merchant fees than the elimination of anti-steering provisions.[58] Second, the reduction of merchant fees for Woolworths can be attributed to a number of other factors, most significantly its rapidly growing charge

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[55] RBA Preliminary Conclusions, at 20; *see also* Amex Tr. at 4652:25-4653:1 (July 31, 2014) (explaining that "regulators forc[ed] a price reduction and forc[ed] the payment networks to reduce their rates").

[56] Amex Tr. at 5823:20-25 (Aug. 7, 2014).

[57] *See* ARA Brief, at *12-13.

[58] *See supra* notes 54-56 and accompanying text.

volume, which resulted from a series of acquisitions and expansions.[59] This dramatic increase in charge volume put Woolworths in a stronger position to negotiate lower merchant fees with all major credit card companies, irrespective of the RBA's regulations.

The ARA's myopic view of the Woolworths "case study" is emblematic of its failure to credit broader market forces for certain developments it claims to have witnessed in Australia. For example, the ARA states that "innovation" in the credit card space has "flourished in Australia" since the "removal of the anti-steering rules."[60] Example "innovations" include the introduction of chip cards, contactless payment systems, and online systems for payment.[61] However, these technologies are already present or emergent in the United States—where anti-steering provisions are still permitted.[62] Indeed, the removal of anti-steering

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[59] *See, e.g.*, Allan Fels, *The Regulation of Retailing—Lessons for Developing Countries*, 15 Asian Pacific Business Review, no. 1, at 13-27 (Jan. 2009); Evan Jones, *Liquor Retailing and the Woolworths/Coles Juggernaut*, Journal of Australian Political Economy, no. 55, at 23-47 (June 2005).

[60] ARA Brief, at *15.

[61] *Id.* at *15, *17.

[62] *See, e.g.*, Sienna Kossman, *Poll: 70 Percent of Consumers Now Have EMV Chip Cards*, CreditCards.com (Apr. 6, 2016), *available at* https://goo.gl/imjSoR; *For the First Time, Visa Chip Transactions in the U.S. Surpass One Billion*, Visa (Mar. 2017), *available at* https://goo.gl/4xYMBK; Juan Rodriguez & Jeff Herman, *Contactless Cards Set to Hit US*, CreditCards.com (Aug. 30, 2017), *available at* https://goo.gl/zXKRHf; *Level of Familiarity with PayPal According to Online Users in the United States as of December 2016*, Statista, *available at* https://goo.gl/4VNua9 (noting that 99% of U.S. online users were aware of PayPal and 76% had used it).

rules in Australia occurred fifteen years ago, and the progress described by the ARA is more the result of technological advancements over that time than an innovation boom *caused* by one element of the Australian regulatory framework.

In sum, the elimination of anti-steering provisions was only a single piece of a larger regulatory system imposed by the RBA, and the direct impacts ascribed to it by the ARA are dubious at best.

III. THE CREDIT CARD INDUSTRIES IN AUSTRALIA AND THE UNITED STATES ARE FUNDAMENTALLY DIFFERENT

Comparisons between the Australian and the United States credit card industries are flawed because they are different in key respects. The ARA claims that it "do[es] not profess to know the intricacies of the U.S. market," but nevertheless asserts—without evidence or corroboration—that "the Australian banking system is very similar to its counterpart in the United States" based on factors like "the mix of credit to debit cards."[63] Drawing that conclusion regarding the similarity of the two economic systems ignores the important differences between Australia and the United States that undermine any comparison of the two nations' credit card industries. As the GAO has made clear, "differences regarding the regulatory and market structures between [Australia, among others] and the United States make it difficult to estimate the effects of any similar actions in the United States."[64]

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[63] ARA Brief, at *23.

[64] GAO Report, at 30.

Critically, the market for issuing credit cards in Australia is structurally different from that in the United States. While thousands of banks issue credit cards in the United States, only four banks in Australia issue a substantial majority of credit cards. As the GAO found, "the four largest banks in Australia issued 55 percent of cards" in 2006, whereas "the United States has more than 6,000 depository institutions that issue credit cards."[65] "[T]herefore," the GAO continued, "the costs of issuing credit cards in [the United States] could be different than in countries with many fewer issuing banks," like Australia.[66] And, as noted at trial, the structure of the Australian market presents a "unique situation"[67] and a "regulatory context" that is "very complicated" and "very different" from that in the United States.[68]

The unique structure of the Australian market allowed credit card companies to partner with the issuing banks in response to the RBA's regulations, an option that would likely not be available in the United States. For example, because there are only four major issuing banks in Australia, Amex was able to work with those institutions and grow its Global Network Services ("GNS") business, through which Amex partners with banks to issue cards on the Amex network.[69] This sort of partnership would not be

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[65] *Id.* at 38; *see* Amex Tr. at 4653:10 (July 31, 2014) (estimating that there are 10,000 institutions that issue credit cards in the United States).

[66] GAO Report, at 38.

[67] Amex Tr. at 4652:25 (July 31, 2014).

[68] *Id.* at 6612:16-17 (Aug. 14, 2014).

[69] Chan, et al., *Pricing over the Past Decade*, at 61.

feasible in the United States, where Amex would be required to forge these relationships—at significant cost—with thousands of institutions, each controlling only a fraction of the credit card industry.

Put simply, "Australia has so many differences from the U.S.," and those "differences are dramatic."[70] The ARA's attempt to analogize those two economic systems is, at best, lacking.

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In sum, the elimination of anti-steering rules in Australia is not relevant for the United States, and to the extent that it is relevant, the outcomes counsel *against* enacting such regulation. The evidence suggests that elimination of anti-steering rules has harmed customers—and competition—more than it has helped. Moreover, anti-steering rules were eliminated in conjunction with other, more significant credit card regulations that are far more likely drivers of any purported positive impacts seen in the Australian economy. These regulations were also implemented in a larger framework that is fundamentally different from the system in place in the United States.

Essentially, the ARA asks this Court to endorse the elimination of anti-steering rules based on the Australian experiment. But that experiment had poor controls, used a non-representative sample, and has yielded disastrous results. Inflicting these regulations on the credit card industry in the United States would be a treatment far worse than the disease.

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[70] Amex Tr. at 6594:11-14 (Aug. 14, 2014).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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January 23, 2018